

These are the tentative rulings for civil law and motion matters set for Thursday, July 23, 2015, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, July 22, 2015. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

NOTE: Effective July 1, 2014, all telephone appearances will be governed by Local Rule 20.8. More information is available at the court's website, www.placer.courts.ca.gov.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. S-CV-0030874 Powers, Craig vs. East West Partners-Tahoe, Inc.

Defendants' Motion for Summary Judgment, or in the alternative, Summary Adjudication

Preliminary Matters

As an initial matter, the court notes defendants filed a non-stipulation to the commission on March 30, 2015. This stipulation, however, is untimely pursuant to Local Rule 20.2.B as the commissioner has previously heard law and motion matters in this action.

Ruling on Objections

Defendants' objections 1, 2, and 3 are sustained. Defendants' objections nos. 4 through 15 are overruled.

Ruling on Motion

The moving defendants seek either summary judgment or summary adjudication as to the second amended complaint asserting the claims are barred by the statute of limitations. A party to the action may move for summary judgment if that party contends there is no merit or no defense to the action. (CCP§437c(a).) A party to the action may also move for summary adjudication if that party contends there is no merit to one or more of the causes of action. (CCP§437c(f)(1).) However, a motion for summary adjudication shall only be granted where it completely disposes of a cause of action.

(*Ibid.*) The moving party has the initial burden. A moving defendant has met its initial burden upon a showing that one or more elements of a cause of action have no merit or there is a complete defense to the cause of action. (CCP§437c(p)(2).) The trial court must view the supporting evidence, and inferences reasonably drawn from such evidence, in the light most favorable to the opposing party. (*Aguilar v. Atlantic Richfield Company* (2001) 25 Cal.4th 826, 843.) Once a moving defendant meets its burden, the burden shifts to the plaintiff to show a triable issue of material fact. (CCP§437c(p)(2).) With these principles in mind, the court turns to substance of the motion.

In this instance, defendants have met their initial burden. Plaintiff's second amended complaint asserts a single cause of action for negligence based upon a slip and fall incident. (Defendants' Evidence Compendium, Exhibit R.) This type of negligence claim has a two-year statute of limitations. (CCP§335.1.) Plaintiff's injuries, which are the basis for his negligence action, occurred on March 1, 2011. (Defendants' Evidence Compendium, Exhibit R ¶¶12-15.) Plaintiff's second amended complaint does not allege any delayed discovery or other tolling of the statute of limitations so the accrual date for the purposes of the statute of limitations is March 1, 2011. (*Ibid.*) In order for plaintiff's negligence action to be timely, his claim needed to be filed by March 1, 2013. (CCP§335.1.) The original complaint was filed on April 2, 2012, which was well within the statute of limitations. (Defendants' Evidence Compendium, Exhibit A.) The original complaint included doe allegations and the moving defendants were later brought into the original complaint through doe amendments. (Defendants' SSUMF No. 3; *Id.* at Exhibit A.)

Plaintiff subsequently filed a first amended complaint on May 16, 2014, which was after the time for the statute of limitations had expired. (*Id.* at No. 4; *Id.* at Exhibit H.) Despite identifying the moving defendants as "does" in the original complaint, plaintiff failed to identify the defendants in the first amended complaint. (*Id.* at Nos. 5-10; *Id.* at Exhibit H.) This omission of the moving defendants is tantamount to a dismissal of the omitted parties without prejudice. (*Fireman's Fund Insurance Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1142-1143.) After the filing of the first amended complaint, the moving defendants took no steps that could be deemed as forfeiture of their right to assert this dismissal from the action and actually sought dismissal in light of the failure of plaintiff to include them in the first amended complaint. (Defendants' SSUMF No. 12.) Plaintiff sought and was afforded leave to file a second amended complaint to specifically name the moving defendants while still allowing defendants the full ability to challenge the second amended complaint. (Defendants' Exhibit Compendium, Exhibit N.) The second amended complaint was filed on August 27, 2014, which was well beyond the two-year statute of limitations. These facts are sufficient enough to shift the burden to plaintiff to establish a triable issue of material fact as to whether the dismissal of the moving defendants from the first amended complaint acted as a bar to their subsequent insertion into the second amended complaint and relation back to the date of the original complaint.

Plaintiff raises several arguments in an attempt to create a triable issue. First, he asserts that since the moving defendants filed answers to the original complaint, they

have forfeited any objection to not being named in the first amended complaint. This, however, is a legal argument that does not create a triable issue on the matter. This legal argument also fails to address the fact that the amended pleading superseded the previous complaint and failed to mention the moving defendants in the caption or the body of the pleading, amounting to a dismissal without prejudice. (*Fireman's Fund Insurance Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1142-1143.) Plaintiff's second assertion that the charging allegations in the original complaint apply to the doe defendants also fails for the same reasons. This is another legal argument that does not address the effect of failing to mention the moving defendants in the first amended complaint. Plaintiff's third assertion, that the original complaint was properly pled and gave fair notice to the moving defendants of the claims against them, is unpersuasive for the same reasons as previously mention. The same reasoning applies to plaintiff's fourth assertion that the action was commenced against the moving defendants prior to the statute of limitations. This argument simply ignores the effect of omitting the defendants from the first amended complaint.

In plaintiff's fifth assertion, he argues any dismissal of defendants The Vail Corporation and Vail Corporation dba Vail Resorts Management Company was done without prejudice to rename them at a later date. (Larson declaration ¶15, Exhibit I.) This still fails to create a triable issue of material fact. First, the discussion in Mr. Larson's correspondence refers to only "Vail Resorts". (Ibid.) It does not appear to extend to defendant The Vail Corporation. Second, plaintiff presents no facts or evidence that would establish a basis to rename "Vail Resorts". This, without more, is insufficient to establish a triable issue.

Plaintiff's final contention is that the moving defendants are equitably estopped from raising the dismissal issue since they have had notice of the claims against them and participated in the litigation for the past two years. Again, plaintiff presents insufficient evidence to create a triable issue. It is undisputed the moving defendants have asserted since they were omitted from the first amended complaint that they have been dismissed from the action and cannot be brought back into it. (Defendants' SSUMF Nos. 4-12.) Their participation in attempting to remove themselves from the litigation does not create a triable issue on the applicability of equitable estoppel.

The ultimate determination of the issues in this motion come down to the following: Plaintiff filed a first amended complaint on May 16, 2014, after the statute of limitations had expired, that did not name any of the previously identified doe defendants. (Defendants' SSUMF Nos. 3-11.) There is no factual dispute over this point. This omission of doe defendants that had previously been identified acted as a dismissal of those defendants without prejudice. (*Fireman's Fund Insurance Co. v. Sparks Construction, Inc.* (2004) 114 Cal.App.4th 1135, 1142-1143.) A dismissal of a defendant without prejudice does not bar renaming of the defendant or commencement of another action by plaintiff so long as this is done within the statute of limitations. (*Troche v. Daley* (1990) 217 Cal.App.3d 403, 412, superseded on other grounds by statute.) The second amended complaint was filed on August 27, 2014. This was well beyond the statute of limitations. Plaintiff's implied assertions of attorney mistake (Larson

declaration ¶19) does not provide relief from the effect of the dismissal or statute of limitations. (see *Castro v. Sacramento County Fire Protection District* (1996) 47 Cal.App.4th 927.) As plaintiff has failed to meet his burden to establish a triable issue of material fact, the motion is granted.

2. S-CV-0031202 L'Amoreaux, Roger, et al vs. Baldwin Contracting Co., et al

The motion for summary judgment is continued to September 24, 2015 at 8:30 a.m. in Department 40 at the request of the moving party. The court is informed the parties are attempting to resolve the issues through mediation.

3. S-CV-0034433 Barboza, Sergio vs. Osterhout, Clark

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, such argument shall heard in Department 42:

Defendant's Motion for Leave to Have Discovery Take Place Closer to the Trial Date

Defendant's motion is denied. The court looks to the following factors when determining whether to grant a request to extend the discovery cut-off date: (1) the necessity and reasons for the discovery; (2) the diligence or lack of diligence of the party seeking the discovery and the reasons that the discovery was not completed earlier; (3) the likelihood that permitting the discovery will prevent the case from going to trial on the set date, interfere with the trial date, or result in prejudice to the other party; and (4) the length of time that has elapsed between the previous trial date and the current trial date. (*Code of Civil Procedure section 2024.050(b)(1)-(4).*) Defendant has failed to make a sufficient showing to warrant an extension of discovery to conduct the requested independent medical examination. Specifically, defendant has not shown diligence in bringing the motion. While defendant claims he only learned of plaintiff's ongoing lumbar spine issues after receiving plaintiff's mediation statement on July 9, 2015, he concedes knowledge of plaintiff's lumbar spine issues since 2014 yet took insufficient steps to follow up on this claim. Defendant received subpoenaed medical records in July of 2014 that contained recommendations of anterior and posterior L3-L4 fusion and decompression. (Kopp declaration, Exhibit 2.) Defendant also received subpoenaed records that he was receiving lumbar epidural steroid injections. (Ibid.) Plaintiff testified at his deposition that the lumbar spine issues were the most painful. (Kopp declaration, Exhibit 8.) The fact that plaintiff then focused upon the cervical spine and not the lumbar spine did not eliminate the issues with his lumbar spine. Defendant has not sufficiently established what steps he took to obtain discovery on the continued issues with plaintiff's lumbar spine nor has he sufficiently explained why he took no further steps to follow up on the issue. Since there has been an insufficient showing of diligence on the part of defendant, the motion is denied.

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Defendant's Motion to Continue Trial

Defendant's motion is denied. Defendant seeks a three-month continuance in order to conduct an independent medical examination of plaintiff. His basis for the continuance mirrors that stated in his motion to have discovery conducted closer to trial. However, defendant has not established good cause for such a continuance. He has not shown sufficient the information regarding plaintiff's lumbar spine issues was newly discovered. To the contrary, defendant concedes he know of these issues as far back as 2014. The lack of focus by on plaintiff's lumbar spine issue does not rise to the level of an excused inability on the part of defendant to obtain essential testimony. Furthermore, the assertion that defendant's counsel "may" be engaged in another trial is not sufficient to warrant a trial continuance.

4. S-CV-0034686 Doe, John HJ, et al vs. S.T.A.R., INC., et al

The appearances of the parties are required on the joint motion for disclosure of documents. While the court is inclined to grant the request, the parties have not fully articulated the scope of the documents subject to disclosure. For example, the parties mention a CPS referral and investigation. However, such documents are subject to W&IC§827 and require a petition to the Juvenile Court for the release of the records. The parties also refer to "pupil records" without further description. The court is unable to discern from this general description whether portions of the Education Code and other agencies may be involved. Finally, the parties failed to provide a draft of the proposed protective order for the court's review.

5. S-CV-0034806 Cummings, Lance vs. Lindsay, Christopher

Plaintiff's Motion to Enforce Judgment

Preliminary Matters

As an initial matter, the court declines to consider any of the supplement evidence submitted with the reply as defendant has not been afforded an opportunity to review and respond to such material. (see *Alliant Ins. Services, Inc. v. Gaddy* (2009) 159 Cal.App.4th 1292, 1307-1308.)

Ruling on Request for Judicial Notice

Plaintiff's request for judicial notice is granted.

Ruling on Objections

Plaintiff's objections are overruled in their entirety.

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Ruling on Motion

The motion is denied without prejudice. Plaintiff's motion is framed as a request to enforce the "judgment". However, no judgment has yet been entered in this case. The court declines to consider the current request as one enforcing the terms of the settlement agreement since such action would be duplicative. The court previously granted such relief on May 17, 2015.

6. S-CV-0035824 People of the State of Ca ex rel. PCAPCD v. McDade, Derek

The demurrer to the answer is dropped from the calendar. The court file does not reflect that defendant has filed an answer in this case.

7. S-CV-0035992 Conrad, Ethan vs. Sydathong, Seng, et al

Plaintiff's application for writ of attachment and right to attach order is granted pursuant to CCP§483.010. The order is subject to a \$10,000 undertaking to be posted by plaintiff. Plaintiff is also awarded \$1,000 in costs and \$5,000 in attorney's fees pursuant to CCP§482.110.

8. S-CV-0036000 Sayles, Charles vs. Shearer, Justina, et al

The motion to strike is dropped from the calendar. A first amended complaint was filed on June 16, 2015.

9. S-CV-0036052 The Gar Wood Building vs. County of Placer, et al

Defendant's Demurrer to the First Amended Complaint (FAC)

Preliminary Issues

As an initial matter, the court notes the current demurrer was filed on June 18, 2015. This was before plaintiff filed its FAC on June 25, 2015. The parties, however, have proceeded to continue the original demurrer hearing date and addressed the substance of this awkwardly positioned demurrer. Absent further objection by plaintiff, the court notes this procedural variance but will proceed to review the substance of defendant's demurrer.

Request for Judicial Notice

Defendant's request for judicial notice is granted. Plaintiff's request for judicial notice is denied.

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Ruling on Demurrer

In bringing the current demurrer, the defendant tends to overlook the established principles of reviewing a pleading challenged by a demurrer. Defendant's discussion regarding the third cause of action for rescission and fourth cause of action for reformation focuses less on the insufficiency of the factual allegations and more upon a purported "lack of showing" by plaintiff. Defendant goes so far as to state the FAC provides enough factual information for a finding that defendant has been prejudiced by plaintiff's delay in bringing the action. (Defendant's reply p. 7:8-10.) A demurrer is not a fact-finding inquiry. The court's analysis is based solely upon reviewing the legal sufficiency of the challenged pleading. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) The court *must* deem the allegations in the FAC to be true *no matter how improbable they may seem*. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.) Returning to defendant's challenges to the third and fourth causes of action, it fails to raise sufficient *legal deficiencies* in the pled allegations. The demurrer as to the third and fourth cause of action is therefore overruled.

Defendant tends to take the same approach in challenging the second cause of action for quiet title. Defendant claims that all necessary parties have not been named in the action referring to exhibits attached to the FAC. However, it then names parties who were previously determined not to have an interest in the property or have subsequently transferred their interest. To reiterate, the demurrer challenges the *legal sufficiency* of the allegations in the FAC. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) Claims of purported omissions that do not tie into a deficiency within the pleading do not amount to a successful challenge on demurrer. Defendant's demurrer as to the second cause of action is also overruled.

This leaves the first cause of action for declaratory relief. The main issue raised here is whether the claim is deficiently pled since the allegations reference the expiration of CUP-1363 and VAA-1942, which are still undergoing the application process. Defendant asserts such relief is premature as the administrative review process is still pending and any challenge to the administrative body's decision should be brought by writ petition. Upon reviewing the allegations in the FAC, it appears that the first cause of action is insufficiently pled. Plaintiff alleges it filed an application for termination and/or modification of the CUP with defendant in August of 2014. (FAC ¶24.i.) It also alleges defendant has refused and delayed processing the application. (Ibid.) Based upon this refusal and/or delay, plaintiff is entitled to a determination that CUP-1363 and VAA-1942 have expired. (Id. at ¶27.) These allegations, however, are contradictory. Either defendant has refused to process the application or its processing has been delayed. Further, the allegations do not sufficiently state the effect of the refusal to process or delay in processing the application on defendant's administrative review process. Finally, the relief sought in the FAC is a determination that the CUP and VAA have expired rather than requiring defendant to proceed with the review process, which tends to support defendant's assertions that the claim is either premature or seeks relief that is better addressed through a writ. The first cause of action for declaratory relief is insufficiently pled and the demurrer is properly sustained as to this claim.

To reiterate, the demurrer is overruled as to the second, third, and fourth causes of action. The demurrer is sustained with leave to amend as to the first cause of action. The second amended complaint shall be filed and served on or before August 7, 2015.

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